ORIGINAL

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

THE WASHINGTON HARBOUR
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202) 424-7500
FACSIMILE (202) 424-7643
WWW.SWIDLAW.COM

NEW YORK OFFICE
THE CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, NY 10174
TEL. (212) 973-0111
FAX (212) 891-9598

EX PARTE OR LATE FILED

RECEIVED

NOV 12 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 12,2002

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Submission by Vycera Communications, Inc. Concerning Application by SBC Communications, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in California. WC Docket No. 02-306

Dear Secretary Dortch:

The following additional information is provided to supplement the Comments of Vycera Communications, Inc. ("Vycera") in the above-referenced proceeding.

Vycera filed comments in this proceeding, and discussed in its ex parte meeting with FCC Staff on November 1,2002, Pacific's ongoing, wrongful refusal to permit it to adopt any part of the California AT&T interconnection agreement. During the meeting, we were asked if we wished to propose some action that the FCC could take to alleviate this problem; the following responds to that invitation. In addition, we respond below to certain statements made in the Reply Affidavit of Colleen L. Shannon regarding Vycera's California opt-in request.

Background

Carriers often want to adopt previously-approved arbitrated agreements **and** avoid negotiating any new terms with an ILECs because: 1) negotiations are very expensive; 2) negotiations delay the CLEC from obtaining an agreement; *3)* CLECs have no bargaining power in a negotiation with an ILEC.

Pacific knows that if it can make a CLEC negotiate, it can obtain concessions in the terms of the agreement, cause significant expense and entry delay to the CLEC, *or* all three. A CLEC's only defense to the expense, legal vulnerability, and delay of negotiation is to adopt a reasonable, previously approved agreement.

ORIGINAL

Vycera sought to avoid becoming ensnared in negotiations by adopting previously-approved California interconnection agreements pursuant to Section 252(i). As set out in detail in Vycera's comments, it has the right to do so pursuant to federal statute, FCC rules, and California rules.

Vycera sent out two requests for adoption of California interconnection agreements on August 30,2002 - one to Verizon, and one to Pacific. Verizon promptly sent back a letter acknowledging the adoption. Pacific promptly and wrongfully refused to permit adoption of any part of the requested AT&T agreement unless Vycera first "negotiated" a new amendment to the AT&T agreement. Vycera refused. Vycera is quite confident that ultimately the California PUC will issue an order favorable to Vycera. The problem is that in the interim, Pacific can and is unilaterally preventing Vycera's adoption of any part of the AT&T Agreement; Vycera cannot now offer partial facilities-based service, nor will Pacific even work with Vycera to conduct pre-scrvicc testing for partial facilities-based service.

Vycera does not believe that this is what Congress, the FCC,[1] or the California PUC intended – to give ILECs the ability to unilaterally block, *for months*, adoptions of entire previously-approved agreements on any pretext. Vycera believes that both the FCC and the California PUC's current rules are clear, and do not authorize Pacific's current refusal to permit Vycera to adopt any part of the AT&T Agreement. However, Vycera is painfully aware that neither the FCC nor the California rules are achieving the desired result because Pacific simply flouts the rules.

---

[1] In the *Local Competition* **Order,** the FCC articulated its understanding of the need to obtain interconnection agreements on an expedited basis on nondiscriminatory terms. It stated:

> 1321. We further conclude that a carrier seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis. We find that this interpretation furthers Congress's stated goals of opening up local markets to competition and permitting interconnection on just, reasonable, and nondiscriminatory terms, and that we should adopt measures that ensure competition occurs as quickly and efficiently as possible. We conclude that the nondiscriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251 before being able to utilize the terms of a previously approved agreement. Since agreements shall necessarily be tiled with the states pursuant to section 252(h), we leave to state commissions in the first instance the details of the procedures for making agreements available to requesting carriers on an expedited basis. Because of the importance of section 252(i) in preventing discrimination, however, we conclude that carriers seeking remedies for alleged violations of section 252(i) shall be permitted to obtain expedited relief at the Commission, including the resolution of complaints under section 208 of the Communications Act, in addition to their state remedies.

In re Implementation of the Local Competition Provisions in the Telecommunications Acr of 1996, First Report and Order, 11 F.C.C.R. 15499 (1996) (subsequent history omitted) *("Local Competition Order").*

ORIGINAL

First, under FCC and California rules' there are only two circumstances under which Pacific is not required to allow CLECs to adopt an interconnection agreement: 1) if provision of a particular interconnection, service, or element would not be technically feasible, or 2) if the cost of providing a particular interconnection, service, or element is greater than the cost of providing it to the carrier that originally negotiated the agreement.' Clearly neither of these circumstances apply in this case. Second, under California rules, Pacific must allow CLECs to adopt all terms of an agreement, effective the date of an arbitration filing, that are not subject to objection under California Rule 7.2 as being either not technically feasible or as being more costly than providing service to the carrier that originally negotiated the agreement.[4] In Vycera's

---

'California Rules Implementing the Provisions of Section 252 of the Telecommunications Act of 1996, CPUC Res. ALJ-181, Oct. 5, 2000 ("California Rules").

[3] Rule 7 of the California Rules sets out the "Process for Adopting a Previously Approved Agreement." Rule 7.2 provides:

> Within 15 days of its receipt of the Advice Letter or Letter of Intent, the ILEC shall either send the requesting carrier a letter approving its request or file a request for arbitration based solely on the requirements in § 51.809.
>
> a. Any individual interconnection, service. or network element arrangement contained in any agreement approved by the Commission pursuant to Section 252 of the Telecommunications Act of 1996. must be made available upon the same rates. terms, and conditions as those provided in the agreement.
>
> b. The obligations of section (a) above shall not apply where the ILEC Droves to the state commission that:
>
> (1) the costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement.
>
> (2) the provision of a particular interconnection, service, or element to the requesting carrier is not technicallv feasible.
>
> c. Individual interconnection service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under 252(f) of the Act.

(Emphasis added.)

[4] California Rules, Rule 7.3.2 provides:

> a. Should the ILEC file for arbitration, the ILEC shall immediately honor the adoption of those terms not subject to objection pursuant to Rule 7.2. effective as of the date of the filing of the arbitration request. Furthermore, to the extent the ILEC seeks arbitration of the costs of a particular interconnection, service, Or element. the ILEC shall immediatelv honor such provisions subiect to retroactive price true-up hack to the date when the arbitration request was filed. based on the Commission's resolution of the arbitration. The effective date of other disputed issues will be set in the arbitration process and could be made effective retroactive to the date when the arbitration request was filed.

(Emphasis added.)

ORIGINAL

case, the only portion of the agreement that Pacific contests are the reciprocal compensation provisions; however Pacific to date has refused to allow Vycera to opt into any portion of the agreement during the pendency of the arbitration proceeding initiated by Pacific.

Pacific's willingness and unchecked ability to ignore existing rules presents the CLEC with the "Hobson's Choice" of being forced into entering into an unfavorable, unnecessary amendment to an agreement it seeks to adopt, or finding itself the respondent in an arbitration proceeding with no agreement and no ability to offer partial facilities-based service. Either choice involves significant expense and delay. Conversely, the ILEC has nothing to lose (if no enforcement action is taken) and much to gain.

Pacific has demonstrated its ability to articulate a basis, however frivolous, to object to a CLEC's adoption of a previously-approved, in-state interconnection agreement. By just refusing to permit the adoption, Pacific has enormous leverage for getting the CLEC to agree to unfavorable amendments to the agreement it seeks to adopt. If the CLEC refuses, and the ILEC gets an adverse decision in the arbitration proceeding, the ILEC still has lost nothing; it has delayed entry by a competitor and caused the competitor to incur expense. Even if the state commission orders the ILEC to consider the adopted agreement as in effect as of the date it filed the arbitration, the ILEC is still better off – it has hurt a competitor by causing expense and delay and is itself in the same position financially as it would have been had it followed the rules and permitted the adoption when requested.

A Proposed Solution

At the November 1,2002, ex parte meeting, we were asked if there were something we could suggest as a "fix" to the problem, such as a clarification of FCC rules.

The FCC rule implementing 47 U.S.C. § 252(i), 47 C.F.R. 551.809, states:

> Availability of provisions of agreements to other telecommunications carriers under Section 252(i) of the Act.
>
> (a) An ILEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to Section *252* of the Act, upon the same rates, terms, and conditions as those provided in the agreement. **An** ILEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.

ORIGINAL

(b) The obligations of paragraph (a) of this section shall not apply where the ILEC proves to the state commission that:

(I) The costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or

(2) The provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.

(c) Individual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under Section 252(f) of the Act.

Vycera requests that, as part of this proceeding, the Commission enforce the requirements of Section 252(i) and 47 C.F.R. §51.809(a) by informing Pacific that it will not grant its Section 271 application for California unless it immediately complies with Section 252(i) and the FCC and California rules implementing same. The FCC should also clarify that 47 C.F.R. §51.809(a) requires ILECs to permit the adoption of all parts of a previously-approved interconnection agreement unless and until a state commission exempts the ILEC pursuant to 47 C.F.R. §51.809(b). The FCC should clarify that the words "not technically feasible" in 47 C.F.R. 451.809(b) mean physical/engineering technical problems, not legal or administrative "technicalities."

Shannon Reply Affidavit

Finally, a few words regarding the "Reply Affidavit of Colleen L. Shannon Regarding Wholesale Policy, Payphone and Paging Issues" attached to SBC's Reply Comments in WC Docket No. 02-306. Ms. Shannon portrays Pacific's illegal refusal to permit the adoption of any part of the AT&T Agreement, even the parts over which there is no dispute, as a small problem. Ms. Shannon says that the Parties' "actual dispute" is a "narrow" one. The legal issues may be narrow, but the harm to Vycera is great, because Pacific is using that very narrow legal issue to completely block the adoption of the entire interconnection agreement and will not provide partial facilities-based service nor even proceed with preliminary testing without one.

Ms. Shannon portrays Pacific as a fair and reasonable company, and suggests that the FCC need not concern itself with Pacific's refusal to provide interconnection in accordance with Checklist Item 1 because the Vycera matter will be quickly resolved, "with an expedited schedule expected to result in a CPUC decision by January 9, 2003." Vycera is *not* certain that the issue will be quickly resolved absent FCC intervention. Vycera expects to receive a favorable decision from the California PUC on January 9, 2003, but Pacific may choose to continue litigating. Delaying Vycera's ability to provide new services pursuant to the interconnection agreement until January 9,2003 has caused harm and continues to harm Vycera.

As Pacific well knows, in the current climate the difference of even a few months' delay in a CLEC's ability to provide services can be critical.

Moreover, receiving Section 271 approval is not likely to reduce Pacific's willingness to flout existing FCC and California PUC rules. Again, Pacific's whole argument for refusing to permit any part of the adoption rests upon a statement in the *FCC* ***Intercarrier Compensation for*** *ISP-Bound* ***Traffic Order'*** that "carriers may no longer invoke section 252(i) to opt in to an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic." The California Rule 7.3.2 currently states that:

> Should the ILEC file for arbitration, the ILEC shall immediately honor the adoption of those terms not subject to objection pursuant to Rule 7.2, effective as of the date of the tiling of the arbitration request. To the extent the ILEC seeks arbitration of the costs of a particular interconnection, service, or element, the ILEC shall immediately honor such provisions subject to retroactive price true-up back to the date when the arbitration request was filed, based on the Commission's resolution of the arbitration.

Yet, Pacific has taken the position that Vycera may not adopt one single word of the AT&T Agreement while the arbitration is pending. In addition, after Vycera filed its comments in this proceeding, Pacific told Vycera that it could no longer proceed with testing until Vycera had its "footprint" established in its billing systems, and that Vycera cannot establish a "footprint" in Pacific's billing systems because of the outstanding Arbitration. Vycera submits that in abruptly ceasing testing in this manner, SBC is knowingly and purposefully attempting to create even greater delays in Vycera's ability to provide new service under the agreement.[6] The delays caused by SBC to date have undermined and thwarted Vycera's ability to compete and have caused and continue to cause extensive harm to Vycera.

Ms. Shannon states that Pacific has made various settlement offers to Vycera, as if that somehow excused or mitigated its flagrant violation of the FCC and California rules regarding adoption of interconnection agreements. Additionally, her description of those settlement offers lacks significant detail. Ms. Shannon says Pacific offered:

---

[5] ***In*** *rhe* ***Matters of Implementation of Local Competition Provisions of Telecommunications*** *Act of1996* ***and Inter-*** *Carrier Compensation for* ***ISP-Bound Traffic***, Order on Remand and Report and Order, 16 F.C.C.R. 915 I (2001) (*"FCC* ***Inrcrcorrier Cornpensarionfor ISP-Bound Traffic Order").***

[6] Vycera notes that in one of SBC's Section 271 affidavits filed with the FCC. SBC's Michael E. Flynn stated that "[w]hen Pacific is unable to immediately assign wholesale prices in accordance with an interconnection agreement, the CLEC is provided service, even if billing is delayed until the required system changes have been made. Once system changes are implemented, an adjustment is made per the terms and conditions of the CLEC's interconnection agreement." Vycera submits that the reasoning proffered by SBC personnel regarding the abrupt halting of testing (*i.e.*, that testing cannot be done until a billing "footprint" is established) is not consistent with SBC's policy as stated to the FCC in the Flynn Affidavit, ¶ 11 in support of SBC's 271 application. Moreover, Vycera's billing "footprint" already is established in Vycera's billing systems since Vycera currently resells Pacific Bell local exchange services.

ORIGINAL

> alternatively, ***an amendment containing the AT&T reciprocal compensation terms and rates*** on a "negotiated" basis to Vycera. Notably, a comparison of the provisions that would he added to the underlying agreement via the later proposed amendment and the exempted AT&T reciprocal compensation provisions reveals that, other than substituting "Vycera" for "AT&T," the substantive language of such provisions is identical.

Shannon Reply Affidavit, ¶ 6.

Reading Ms. Shannon's statement quickly, the reader may think that Pacific offered to give Vycera the AT&T terms as long as Vycera would agree to exempt them from its adoption request and agree that they be contained in an new amendment to the AT&T Agreement Vycera **seeks** to adopt. That is not the case. It is true that Pacific eventually offered Vycera an amendment containing the AT&T reciprocal compensation terms and rates, and that the language of the AT&T provisions *themselves* in the proposed amendment were identical to the AT&T provisions in the AT&T Agreement that Pacific is insisting Vycera may not adopt. If the AT&T provisions had been the only provisions contained in the later-proposed amendment, this matter would have settled long ago, just in the interest of expediency. Pacific has not offered Vycera a "clean" amendment containing only the AT&T language; every proposal made by Pacific containing the AT&T provisions *also contains* ***new,*** *unfavorable language.* Pacific's response to Vycera's objections to adding any *new* language to the AT&T Agreement is to propose yet another amendment containing the AT&T provisions and *different* new, unfavorable terms. Pacific spins this - the new unfavorable language – as its "standard amendment reservation of rights language."[7] What Ms. Shannon calls "standard amendment reservation of rights language" Vycera calls unfavorable terms Pacific should not be able to force Vycera to agree to IN AN ADOPTION.

Ms. Shannon also uses the illogical "bandwagon" argument in an attempt to persuade the FCC that because Pacific is doing this to other CLECs, and those CLECs have not chosen to incur the expense of fighting, that there is nothing wrong with it. ("Moreover, at least five (5) CLECs that have opted into the AT&T Agreement without the reciprocal compensation provisions have incorporated the reciprocal compensation terms from the AT&T Agreement as negotiated provisions via the proposed amendment.") In other words, this problem is not unique to Vycera. Pacific Bell fails to satisfy Checklist Item 1 because it wrongfully refuses to make

---

[7] Ms. Shannon says:

> In the Amendment containing the AT&T terms and conditions, Pacific also noted (by using an asterisk) that certain of the AT&T provisions in the proposed amendment were "Non-Voluntary Terms" (i.e., arbitrated provisions as ordered by the CPUC in D. 00-08-011 (App. C, Tab 64)). Pacific also proposed *its* standard amendment reservation of rights language to be included in the amendment to ensure it was clear that Pacific was not waiving any rights in entering into the Amendment (including, among other things, its right to adopt at a future date, the ISP terminating compensation plan and rates from the ISP Reciprocal Compensation Order)....

Shannon Reply Affidavit at 6, fn 3.

ORIGINAL

interconnection agreement terms available on a nondiscriminatory basis, as required by law. To grant Pacific Section 271 authority while it continues this practice would be wrong.

Please do not hesitate to contact us if you would like additional information regarding these issues.

Very truly yours,

Patrick J. Donovan
Rogena Harris
Katherine A. Rolph

Counsel for Vycera Communications, Inc.